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IN THE

Supreme Court of the United States

October Term, 1933. **No. 831.**

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commissioners of the State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the relation of ELIZABETH G. PIERSON,

Respondent.

MOTION ON BEHALF OF THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

COME NOW, Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, and move this Honorable Court for leave to file the annexed brief as *amicus curiae.*

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BRIEF ON BEHALF OF THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS AS *AMICUS CURIAE.*

Statement.

The question presented in this case for the decision of this Court is whether the State of New York in levying a personal income tax based upon the "net income" of a person domiciled therein may take into consideration, for the purpose of computing such "net income," income received by such person from real property owned by her and situated in another state of the United States.

Specifically, the facts are that Elizabeth G. Pièrson was domiciled in the State of New York (R. fol. 4) and was the owner of real property situated in the City of Cincinnati, State of Ohio (R. fol. 8), from which in the year 1928 she received rental income of $2,223.72 (R. fols. 8-9). In making her personal income tax return pursuant to Article 16 of the New York Tax Law, Mrs. Pierson set forth the fact of the receipt of this rental income but failed to include the same in her gross income, from which gross income certain deductions and exemptions specified in said Article were subtracted in arriving at her "net income" upon which the tax was imposed (R. Exhibit 2, side fols. 15 & 15-a). Thereafter, the State Tax Commission of the State of New York made an additional assessment of personal income tax against said rental income (R. Exhibit 4, side fols. 17 & 17-a), which additional assessment was paid under protest (R. fol. 6). This proceeding was instituted to review the additional assessment.

It was the view of the majority of the justices who decided this case in the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department that to tax the income of the Ohio real estate would be the equivalent in law of taxing the real estate itself. The New York Court of Appeals in affirming the decision at Appellate Division wrote no opinion so that we are without the benefit of the views of the judges of that Court.

ARGUMENT.

POINT I.

The statute of the State of New York assailed in this proceeding does not impose a tax upon real property of the relator situated in the State of Ohio and does not violate the provisions of the Constitution of the United States.

The claim of unconstitutionality seems to be predicated upon an infringement of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

At the outset it may be conceded that the State of New York has no jurisdiction over real property situated beyond its borders, and if the law under which the tax attacked in this proceeding was assessed does undertake to subject real property so situated to taxation, the enforcement of such law should be proscribed. This being so, it is important that the provisions of the statute be examined.

The tax was levied pursuant to Article 16 of the New York State Tax Law which imposes a personal income tax by the following language:

> "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined * * *." (New York Tax Law, §351.)

The basis for the tax is "net income." "Net income," which is purely a statutory conception, is ar-

rived at by ascertaining the "gross income," which includes "gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or as distributable shares." Certain items of income are specifically excluded (New York Tax Law, §359). From the "gross income" so ascertained certain amounts are deducted, such as business expenses, interest, taxes, losses, bad debts, depreciation, exhaustion, contributions for charitable purposes, etc. (New York Tax Law, §360). Certain exemptions are then allowed (New York Tax Law, §362).

Even a casual examination of the provisions above referred to would seem to dictate the conclusion that the statute does not tax real property as such. It does not purport to impose a tax upon property of any nature as such, except as a person's "net income" may be regarded as a species of property.

The personal income tax has none of the characteristics of a real property tax. It is not based upon valuation. There is no provision whereby the tax is made a lien upon the property from which the income is derived and the obligation for its payment would

not follow the property in case of a sale or other disposition thereof. When it becomes necessary to enforce the tax, the law provides for proceedings only against the person of the taxpayer and his property within the State of New York (New York Tax Law, §§379, 380, 381). If the decision below be accepted the tax would not apply to all real property as no tax would be imposed upon non-revenue producing real property, or real property occupied by a taxpayer as a home or for business purposes. There would be no uniformity as to the rate of tax for this would depend not upon the amount of the rental income but upon the amount of all of the income of the taxpayer and also upon the amount of deductions and exemptions to which the taxpayer might be entitled. It may be safely asserted that the tax does not in any way resemble a real property tax.

The nature of the tax has been passed upon by the courts of New York State, and it has been decided that the tax is upon the individual, his income being used only as a measuring device.

In *People ex rel. Central Union Trust Co. v. Wendell*, 197 App. Div. 131, aff'd without opinion, 231 N. Y. 629, it was said (pp. 135-6):

> "The income tax is not directly at least imposed on any particular income. The recording tax is imposed on the mortgage (§253); the income tax is a tax on the individual. It is 'imposed upon every resident of the State' (§351). His income is used only in fixing the measure of such tax. It is the 'net income' on which the tax is computed (§351). The 'net income' means the 'gross income' of the taxpayer less legal deductions (§357) and in determining the 'gross income'

> mortgage interest as well as all other income is included with numerous exceptions specified in section 359. From such 'gross income' thus determined are to be subtracted numerous deductions (§360) and also certain exemptions (§362) before the tax is computed. Hence the income from any particular source is but one element to be considered in connection with other elements in determining the measure of the taxation which is imposed on the individual. In no proper sense may it be said that the tax is imposed on the interest of any particular mortgage. That is merely a factor in the determination of the amount of such taxation."

Necessarily the income from any given source completely loses its identity in the process of arriving at the "net income." Indeed, there is no certainty that a person having gross income which includes rental income from real property situated in another state will have any "net income" or will ever be called upon to pay any tax.

The history of the New York personal income tax is added evidence that the tax is not imposed upon real property. The law was passed in 1919 following the complete breakdown of the general property tax as applied to intangible personal property. Prior to that year, intangible personal property had been subjected to the same taxation as real property, but the rate of tax was so high as to be almost confiscatory of the income from securities, with the result that the law was not enforced and the tax became easy to dodge. The tax on income was intended to be a substitute for the tax on intangible personalty. The latter was expressly exempted from general property taxation (Section 352 of the Tax Law, as enacted by Section 1 of Chapter

627 of the New York Laws of 1919 and Section 3 of said Chapter). No change whatsoever was made in the tax on real property. Historically the personal income tax was not a real property tax but was a personal imposition.

The personal income tax of the State of New York is a tax levied upon persons domiciled in that State for the purpose of defraying the cost of government generally. It is based upon the "ability to pay" theory as distinguished from the "benefit" theory, which latter accounts to a large degree for the real property tax. The distinction between the real property tax and the personal income tax is also apparent when these taxes are related to the two great bases for taxation, viz., wealth and income. The real property tax is primarily a tax upon wealth as represented by valuation, whereas the personal income tax, as its name denotes, is in the true sense a tax upon income.

Every person has a free choice of domicile. If he or she chooses to establish a domicile in New York State, thus becoming entitled to and receiving all of the protection and benefits with which that State clothes its residents, it is manifest that such person should be required to contribute to the cost of maintaining the state and local government. What fairer method of measuring the contribution could be established than "net income"? Should a resident of the State of New York whose income is derived wholly from real property in other states be exempted from paying his or her share of the cost of government in that State when another resident having an identical income, not derived from real property outside the State, is required to pay?

A state might, if it chose, abolish all forms of taxation except the personal income tax and rely exclusively upon that for the cost of maintaining government. If this should happen and the decision below should be affirmed, it would be possible for persons domiciled in a state who derived their entire income from real property situated outside the state to enjoy all the fruits of the state government without contributing toward its cost. This would be a violation of the fundamental law implicit in the scheme of government, that those who enjoy its benefits shall contribute toward its maintenance, and a doctrine which would permit such a result ought not to be countenanced.

Domicile in itself has been held to establish a basis for taxation.

> *Lawrence v. State Tax Commission,* 286 U. S. 276.

If this be so, why may not the amount of the taxes based upon domicile be measured by ability to pay as represented by "net income"? A person who derives his income from real property in another state cannot obtain living accommodations, food, clothing, or anything else in the state of his domicile without paying for them out of that income, and there is no reason why such a person should be entitled to obtain the manifold benefits of government afforded by the domiciliary state without paying for them. As such a person's income regulates expenditures for every other purpose, so should it measure his contribution oward the cost of government.

A cogent summation of the point under discussion is found in the opinion in *Maguire v. Tax Commissioner,* 230 Mass. 503, where it was said (pp. 512-3):

> "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference."

Another very clear statement of the nature of an income tax is contained in *Crescent Mfg. Co. v. Tax Commission*, 129 S. C. 480. The opinion in this case sets forth concisely the reasons why a personal income tax should apply to the entire income of a resident of the taxing jurisdiction without regard to the source from which such income is derived. The Court said (pp. 485-6):

> "The income tax is primarily a subjective tax imposing personal liability upon the recipient of the income. It proceeds fundamentally upon the theory that all residents and citizens of the State, whether natural persons or domestic corporations, should contribute to the public treasury in proportion to ability to pay, measured by the amount of net income from all sources. The State's jurisdiction to levy the tax is not referable to and dependent upon jurisdiction of the property or of the business operations from which the income is derived. The State has jurisdiction, for taxing purposes, of property and of business operations

conducted within its borders, regardless of whether it has jurisdiction of persons who own the property or operate the business. It can tax the property in the form of a direct *ad valorem* property tax or otherwise; it can tax the business operations in the form of a license tax or otherwise. If, therefore, an income tax is to reach a source of taxable ability, not already subject to taxation, through the property tax and the business tax (taxable resources of which the State usually avails itself fully), it must necessarily apply to income derived from sources beyond the State's jurisdiction to reach otherwise than through its jurisdiction of the person of the recipient. Further, if the basic theory of the income tax is valid—that the residents and citizens of the State, natural and corporate, of whom the State has personal jurisdiction should contribute to the public treasury in proportion to *ability* to pay, and that net income is a sound measure of such ability to pay—it would seem entirely clear that the resident or citizen of the State who gathers his income from beyond the State's borders is just as *able* to pay as the resident or citizen who derives his income from sources within the State. And, indeed, as will be hereinafter pointed out, from the standpoint of an equitable distribution of the State's tax burden, it is of more importance that the tax should apply to income derived from sources outside the State than that it should apply to income derived from sources and operations within the State. Necessarily therefore, the genuine income tax, such as the Federal income tax in force at the time of the passage of this Act, is a general personal income tax, applicable to the net income of the recipient from all sources."

The case also contains a very apt illustration of the result which would obtain if the decision below should be sustained by this Court. It was said (pp. 496-7):

"To illustrate: Here are two men, residents and citizens of the City of Chester, S. C. Each has a net income of $15,000.00. One derives his income from farms and mercantile operations in the State of South Carolina; the other derives his income from investments in land and from an interest in an insurance business conducted in the State of North Carolina. Both get the benefit of all that the government of the State, through expenditures from the public treasury for schools, roads, police protection, and the social and economic welfare of the people, can furnish. Under the construction of this Act approved in the Circuit decree, the citizen who derives his income from his farms and mercantile business within the State, in addition to paying into the treasury of the State a direct tax on his property, real and personal, a municipal license tax on his mercantile business, and a tax on his income to the Federal Government, must pay to the State as a tax on his net income ⅓ of the amount paid as income tax to the United States. But the other citizen of Chester, whose income of $15,000.00 is derived from sources outside the State, and who gets practically as much out of the State in the benefits of government as the other man, would have to pay for the support of that government *not one cent,* exclusive of his poll tax and, perhaps, a nominal street or road tax, etc. Between these two income earners or gatherers, an intent on the part of the Legislature to discriminate against and tax the citizen of the State who receives his income from sources and operations within the State and exempt the other is not to be readily implied. Why resort to an 'income' tax at all, if the burden thereof is to be borne exclusively by the class of the State's citizens who already pay the property and business taxes of the State? That the construction of the Act approved in the Circuit decree, which confines the application of the tax to income derived from operations and sources within the State, would work a serious and unjust discrimination against

> that class of the State's citizens and taxpayers, whose income is derived from local sources in favor of that large class of the State's citizens, natural and corporate, whose income in whole or in part is derived from operations and sources outside of the State, would seem to be sufficiently apparent."

From the standpoints of economics, equity, sound taxation and common sense, a state should have power to impose a net income tax upon persons resident within its borders, based upon the inclusion in gross income of all items of income received by the taxpayer, including rental income of real property situated outside the state. Only a narrow, legalistic argument can be made to the contrary, and such an argument ought not to find favor with this Court, unless it is founded upon a direct, clear, and unmistakable mandate of the Constitution.

THE DECISION OF THIS COURT IN *COOK V. TAIT*, 265 U. S. 47, CONTROLS THE ISSUE HERE PRESENTED.

In considering the above decision, it must be borne in mind that the question in the case at bar relates solely to the POWER of the State of New York to impose the tax, and that the courts below seem to have reached their decisions on one ground only, viz., that the tax is imposed upon the Ohio real estate, a taxable *res* which is beyond the jurisdiction of the State of New York.

The facts in *Cook v. Tait* were identical with the facts in the matter under argument, except that in the

former the taxing sovereignty was the United States of America and the income against which the tax was asserted was income from real property situated in a foreign country, whereas, in the latter, the taxing sovereignty is the State of New York and the income against which the tax is asserted is income from real property situated in another of the states of the American Union.

George W. Cook, the plaintiff in error, was a native citizen of the United States but a resident of Mexico, domiciled in the City of Mexico. His income was derived from real property situated and tangible personal property permanently located in Mexico. He contended that his income was not subject to the net income tax imposed by the United States Revenue Act of November 23, 1921, for the reason that the Congress had no power to impose a tax upon income received by a native citizen of the United States who was at the time when the income was received permanently resident and domiciled in the Republic of Mexico, when such income was derived solely from real and personal property permanently located at all times without the territorial jurisdiction of the United States and solely within the territorial jurisdiction of the Republic of Mexico. The same claim was advanced as is urged on behalf of Mrs. Pierson, that the power of taxation inherent in sovereignty is limited to the territorial jurisdiction of the sovereign, and an attempt to impose a tax upon property beyond that jurisdiction is void. An infringement of the due process clause of the Fifth Amendment of the Constitution of the United States was alleged. The decision of this Court sustained the tax. Can there be doubt but

that if the United States has power to tax the income of its citizen who is domiciled in a foreign country, such income being derived from real property situated in the foreign country, merely because the recipient of the income is a citizen of the United States, the State of New York has like power to tax the income of its own citizen, who is also domiciled within its jurisdiction, from real property situated in another state?

Let us now consider what was said in the opinion in the *Cook* case with respect to the limitations upon the power of a state that do not affect the national power. Of course, the statements in this regard were *obiter,* but it is not necessary to attack them on this ground alone. It was said that the taxing power of a state encounters at its borders the taxing power of other states and is limited by them, whereas there is no such limitation upon the national power.

If the State of Ohio had jurisdiction to impose a personal income tax upon Mrs. Pierson, measured by her "net income," such as the State of New York had by virtue of the fact that she had her domicile in the latter state, there would be a conflict between the taxing power of the State of Ohio on the one hand and the taxing power of the State of New York on the other, but inasmuch as the State of Ohio had no jurisdiction *in personam* there could, of course, be no conflict between its right to tax and the right exercised by the State of New York. Ohio's jurisdiction to tax was limited solely to a tax *in rem.* If New York were endeavoring to impose a tax *in rem* against the Ohio real estate, there would be no question of the lack of power so to do, but New York's tax is personal and

represents a charge to the taxpayer for the benefits of government enjoyed by her in the State of New York measured by her net income computed by taking into consideration her income from all sources.

If the decision below is to be affirmed, it must be found that New York has taxed real property situated in Ohio. No one would contend that the United States had power to tax real property situated in Mexico, or that its power to tax real property in that country was any greater than the power of the State of New York to tax real property in Ohio. Therefore, it inevitably follows that when the United States in the *Cook* case taxed the net income of its citizen, it was not taxing real property in Mexico, and it is just as inevitable that New York, when it taxed the net income of its resident, was not taxing real property in Ohio. The logic is inescapable, and the *Cook* case is positive authority to sustain the tax imposed by the State of New York.

The point just made was fully considered in the *Cook* case. This is evidenced by the opinion of the District Court reported in 286 F., at p. 409, where in speaking of the argument of the plaintiff, that a tax on income of real property is a direct tax and that one state may not tax real property in another, it was said (p. 412):

> "Upon the assumption that an income tax is a direct tax, and is levied upon property outside the United States, the plaintiff's reasoning is clear and simple. It is true that, if sound, it carries us farther than is necessary for a decision of this case, for apparently it would deny the right to tax so much of the income of a resident as comes from property located in foreign lands."

Could there be any question as to the power of the State of New York to tax its citizen and resident on net income computed by including in gross income income of real property situated in Mexico? Apparently not, because there could be presented no question of the taxing power of the State of New York encountering the taxing power of any other state of the Union. If New York would have the power to reach the income from real property situated in Mexico, no doubt could exist but that the tax was not imposed upon such real property, and, if the real property in Mexico would not be taxed, certainly a like tax with respect to income from real property situated in Ohio would not be a tax upon that real property.

See also:

Bowring v. Bowers, 24 F. 2d 918, certiorari denied, 277 U. S. 608.

Lawrence v. State Tax Commission, 286 U. S. 276, *supra.*

This case strongly supports the right of the State of New York to impose the tax. It holds that income from activities carried on outside the state of domicile may be taxed by that state. The decision is ample authority in principle to sustain the power of New York to tax, if indeed it is not controlling. Mr. Justice Stone, in delivering the opinion of this Court, said (pp. 279-81):

> "The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who en-

joy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. See *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 58; *Maguire v. Trefry*, 253 U. S. 12, 14, 17; *Kirtland v. Hotchkiss*, 100 U. S. 491, 498; *Shaffer v. Carter*, 252 U. S. 37, 50. The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. *Kirtland v. Hotchkiss, supra.*

"Taxation at the place of domicile of tangibles located elsewhere has been thought to be beyond the jurisdiction of the state, *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *Frick v. Pennsylvania*, 268 U. S. 473, 488-489; but considerations applicable to ownership of physical objects located outside the taxing jurisdiction, which have led to that conclusion, are obviously inapplicable to the taxation of intangibles at the place of domicile or of privileges which may be enjoyed there. See *Foreign Held Bond Case*, 15 Wall 300, 319; *Frick v. Pennsylvania, supra*, p. 494. * * * the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges

> incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it bears a direct legal relationship.
>
> * * * * *
>
> "We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside the state of the owner are not subject to taxation within it, or is in any respect so arbitrary or unreasonable as to place it outside the constitutional power of taxation reserved to the state."

The doctrine that enjoyment of the privilege of residence within the State, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government becomes evanescent if a citizen may reside within a state and be exempted from all liability for sharing the costs of its government merely because his income happens to be derived from real property situated in another state.

THE DECISION OF THIS COURT IN *POLLOCK V. FARMERS' LOAN & TRUST CO.*, 157 U. S. 429, HAS BEEN MISCONSTRUED BELOW.

Perhaps there has been no case decided by this Court during its existence that has been productive of greater misunderstanding and has been more misconstrued than the *Pollock* case. While it may seem like carrying coals to Newcastle for counsel to endeavor to state to this Court the *ratio decidendi* of this case, in view of the extreme familiarity of the Justices with it, nevertheless the statement is ventured that the case does not hold that to tax the income of real prop-

erty is *ipso facto* to tax the real property itself, but merely decides that a tax upon the income of real property is a direct tax within the meaning of that term as used in section 2 of Article I of the Constitution. For that much the case is authority, but it is respectfully submitted that it is not authority for the decisions of the courts below.

The statement in the *Pollock* opinion that "An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income" (p. 581), which was relied upon in the opinion at Appellate Division and which constitutes almost the sole basis for the relator's argument, was a mere *dictum* of this Court, uttered forty years ago in one of the most bitterly contested cases that this Court has ever considered, and in the decision of which it divided five to four. Counsel will seek to demonstrate that this *dictum* has been completely annihilated in the intervening years, and it seems remarkable indeed that in the light of the present day conception of the taxing power it should be seized upon as determinative of so important an issue as that which this case presents.

The weight to be ascribed to this *dictum* must be admeasured by a consideration of the question that was before this Court. It is a simple matter to select particular words from an opinion and divorce them from their context in such manner as to give to them an entirely different meaning than was ever within the contemplation of the user.

The question in the *Pollock* case was (p. 558):

> "* * * whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution."

It is at once apparent that the case did not involve the question at issue in this proceeding. There was no doubt of the right of the United States to tax the rental income of all of the real estate within its boundaries. The issue was the method of taxation—whether apportionment according to population was necessary, as it would be under the Constitution if it were a direct tax. The determination as to whether the tax was direct or indirect turned on whether it could be passed on by the taxpayer or had to be borne by him directly, *i. e.,* on the economic theory of direct *versus* indirect taxation. Hence, what was said concerning a tax on rents being a tax on the property was *obiter* and unnecessary to the decision.

There can be no better statement of the rule as to the weight to be given to *obiter* statements than is contained in *Cohens v. Virginia,* 6 Wheat. 264, which was quoted with approval at p. 574 of the *Pollock* opinion, viz.:

> " 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' "

It really is unnecessary to go beyond the *Pollock* case to find the limitation which has been placed upon what was there said. The case was reargued, the opinion on reargument being reported in 158 U. S., at p. 601. Chief Justice Fuller said (p. 618):

> "Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; * * *"

In summarizing, the real point of decision was brought out at p. 637, where it was said:

> "Our conclusions may, therefore, be summed up as follows:
>
> "*First.* We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes."

The scope of the *Pollock* case, as related to the question at issue, was brought out in *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, in which it was contended that the Federal income tax statute passed after the adoption of the Sixteenth Amendment of the Constitution, which permitted the levying of an income tax, was invalid. Chief Justice White, who participated fully in the *Pollock* decision and who certainly understood that case as well as any one, wrote the opinion in the *Brushaber* case. In discussing the *Pollock* case, he said (pp. 16-7):

"Coming to consider the validity of the tax from this point of view, while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was from the point of substance to burden the property from which the income was derived and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. * * * Moreover in addition the conclusion reached in the *Pollock Case* did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it."

This shows clearly that all this Court did in the *Pollock* case was to determine that a tax upon the income of real property would be a violation of the intent of the framers of the Constitution if it were levied without apportionment. That was far different from laying down the principle that a tax upon the income of real property is a tax on such real property in the sense that if jurisdiction to tax the real property is wanting a tax upon net income must be levied by wholly disregarding the income from the real property.

In *Young v. Illinois Athletic Club,* 310 Ill. 75, at p. 80, the point of the decision in the *Pollock* case was succinctly stated as follows:

> "In the *Pollock case,* which is strongly relied on by appellant, the question before the court was whether or not a tax on the rentals derived from real estate is a direct tax. The decision of that case related to the constitutional powers of Congress to pass an income tax law, and it was held that such taxation was direct and not indirect within the meaning of the constitution, and the Income Tax law was therefore held unconstitutional. But the court, as indicated by the language in its opinion on rehearing (158 U. S. 601), 'went no further as to the tax on the income from real estate than to hold that it fell within the same class as the source whence the income was derived,—that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct.' The issue arising in the *Pollock cases,* therefore, was not whether an income tax was a tax on real estate or an interest therein, but whether such tax based on rentals was a direct tax and therefore within the prohibition of the constitution."

Also, in *Diefendorf v. Gallet,* 51 Ida. 619, it was said (p. 628):

> "Defendant makes the broad general contention that income from whatever source derived is property for the purpose of taxation, and that a tax thereon is a property tax. Principal stress is laid, however, upon the charge that a tax upon income derived from property, such as rent, interest, etc., is a tax upon the property itself, which is unconstitutional because not laid uniformly according to value, and that the entire act must fail if power to tax income from property be denied. Defendant relies principally upon certain language of the majority opinion in *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429, 15 Sup. Ct. 673, 39 L. ed. 759, which, if taken out of the

context and without reference to the immediate objects of that action, incline towards his position. It is to be remembered, however, that the Pollock case only decided that a tax upon the income from property was such a direct tax as had to be apportioned under the existing provisions of the federal Constitution. We can best place the Pollock case in true balance by referring to the later case of *Brushaber v. Union Pac. R. Co.*, 240 U. S. 1, Ann. Cas. 1917B, 713, 36 Sup. Ct. 236, 60 L. ed. 493, L. R. A. 1917D, 414, wherein the court said:

" 'Moreover in addition, the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it.'

"The Pollock case is also distinguished in *Featherstone v. Norman*, 170 Ga. 370, 70 A. L. R. 449, 153 S. E. 58, and in *Sims v. Ahrens*, 167 Ark. 557, 271 S. W. 720."

It is believed that what has been said establishes that the *Pollock* case is not authority for the proposition that a tax upon net income arrived at by including rentals from real property in gross income is a tax upon such real property.

Certainly, the settled law of New York is that a tax on rents of real property is not a tax on the real property itself. *Van Rensselaer v. Dennison*, 8 Barb. 23,

is a leading case on this point. The question decided was whether a tax on rents reserved in a lease constituted a tax on the granted premises.

The case was decided by the Albany General Term. It was said (p. 26):

> "It was a tax on rents issuing out of the granted premises, but in no sense, I think, a tax on the 'granted premises.'"

That case might also be regarded as prophetic with respect to the issue in the case at bar, for it was also said (p. 27):

> "It was the income of the person which was taxed, at a uniform value, prescribed by the statute. Suppose a general income tax should be laid, and the plaintiff in this case should be assessed for his whole income; could he collect a part of the tax from the defendant, under this covenant, because a portion of his income was rent of the defendant's farm? I think not; nor do I see how the cases would differ in principle. In both it would be a tax on the income alone."

To the same effect is the decision in *Brainard v. N. Y. C. R. R. Co.*, 242 N. Y. 125, where a railroad company had contracted with another railroad company that the latter should operate its road and share the gross earnings, the operating company having been required to pay all taxes and assessments which might be levied or become chargeable on the road or property, or upon the owning company, by reason of its ownership, and the question was whether the operating company was liable to pay the income taxes of the owning company based upon its share of the gross earnings. It was held that the operating company was not liable.

THE LAW OF MASSACHUSETTS

In *Codman v. American Piano Co.*, 229 Mass. 285, a lease contained a covenant that the lessee should pay "all taxes and assessments whatsoever which may be payable for or in respect of the leased premises during the term thereof". The lessor was required to pay a Federal income tax on an assessment computed upon the basis of the inclusion of the rent for the demised premises in gross income, and sought to recover from the lessee so much of said tax as was attributable to the rent, claiming that the tax on the rental income was a tax on the property leased and citing the *Pollock* case as authority. The Court dismissed this contention and held that the lessee was not liable. The opinion contains reasoning which so strongly supports the position taken in this brief that the liberty of quoting from it rather copiously will be taken. It was said (pp. 288-91):

> "The case of *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, dealt with the federal income tax law of 1894, and decided that a tax levied upon rents or income received from real estate was a direct tax and was unconstitutional because not levied in accordance with the constitutional rule of apportionment. In coming to the conclusion that a tax upon the rents or the income from real estate was a direct tax, the Court said at page 581, 'An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.' Accordingly it was held that a tax upon such rents was as much a direct tax as a tax upon the land itself.
>
> "When the case was heard in re-argument, 158 U. S. 601, the previous decision on this point was reaffirmed in the following language at page 637: 'We adhere to the opinion already announced,

that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.'

"The decision in the Pollock case that a tax on rents of real estate is a direct tax, and that therefore the federal income law which provided for a tax upon such rents was unconstitutional, related only to the constitutional power of Congress to tax incomes. The court did not consider or decide that a tax on rent was a tax for or in respect to the premises from which the rent was derived. That is a wholly different question.

"On rehearing of the Pollock case the court at page 618 expressly limited its judgment in the following words: 'Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no further, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct.' Neither the Suter case nor the Pollock case decides the question presented in the present case, and therefore do not support the plaintiffs' contention.

"When rent from land has become due, it is personal property; it is a chose in action and does not pass by a conveyance of the land. *Burden v. Thayer,* 3 Met. 76.

"If a lessor dies during the term, the rents accrued during his lifetime are personal property and pass to his administrator, while rents that accrue after his death go to his heirs, or to whoever may be entitled to the real estate subject to the demise. *Clark v. Seagraves,* 186 Mass. 430, 439.

"So rent from real estate which has accrued is held to be taxable at the domicil of the lessor. *Old Dominion Steamship Co. v. Virginia,* 198 U. S. 299 while the real estate from which rent is derived is

taxable at its *situs*. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194.

"In this Commonwealth taxes upon real estate are assessed to the owner or person who is in possession on the first day of April, St. 1909, c. 490, Part I, §15. St. 1914, c. 198, §2. St. 1915, c. 237, §23.

"In determining whether the language of the covenant in the lease in question is sufficiently comprehensive to impose upon the lessee the obligation to indemnify the lessors who have paid the taxes under the tariff act of 1913 depends upon the construction of the phrase 'for or in respect of the said leased premises.' These words are to be interpreted in accordance with their natural and ordinary meaning. Manifestly taxes upon the real estate come within the terms of the covenant. It is equally clear that taxes for betterment assessments under such a covenant would have to be paid by the lessee unless otherwise stipulated in the lease.

"On the other hand, we cannot construe the phrase in question as including within its terms a tax assessed by the federal government to the lessor upon the rents reserved under the lease. Such an assessment is upon an entirely distinct kind of property than is the assessment upon the real estate. While under the federal income tax law a tax on rent is a tax on land and so a direct tax, yet a tax on land is not a tax on rent; the defendant did not covenant to pay taxes for or in respect of the rent; his undertaking is to pay the taxes for or in respect to the premises. The covenant obligated the lessee to pay the taxes upon the real estate but not upon the income in the form of rent which arose therefrom.

"In construing the covenant, it is plain that taxation upon real estate means one thing, and taxation upon income means another.

"Under a covenant in a lease substantially like that under consideration, it was held that it did not include a tax upon the rent reserved.

Van Rensselaer v. Dennison, 8 Barb. 23.

> "In *Woodruff v. Oswego Starch Factory,* 70 App. Div. (N. Y.) 481, affirmed in 177 N. Y. 23, it was held that it would not be a natural or reasonable construction of a similar covenant to interpret it as including a tax upon the rents reserved under the lease. In that case the court uses this language: 'Plaintiffs would be assessed in respect of the demised premises, and it would become the duty of the defendant to protect them and the premises against such assessment by paying the tax thereon. But when we pass beyond this class of assessments and assume one made against the lessor upon his income or rents received under a lease, and otherwise in no manner based upon or measured by the lands leased, their value, character or condition, it seems to us that it would be a strained construction to say that such tax was on account of, relating to, or "in respect" of, the demised premises, within the meaning of the covenant.' *Codman v. Johnson,* 104 Mass. 491. *Twycross v. Fitchburg Railroad,* 10 Gray, 293."

It must be remembered, as heretofore stated, that the question at issue here is one of power to tax, and does not permit of fine distinctions of legal reasoning concerning the incidence of the tax or its effect. If New York has power to tax its resident on net income arrived at by including the Ohio rentals in gross income, it makes no difference at all that from certain points of view the tax may be considered as affecting the real property in Ohio. In order to prevail, relator must establish that when New York taxes the net income it taxes the real estate in Ohio.

CASES IN OTHER STATES

Young v. Illinois Athletic Club, 310 Ill. 75, *supra,* involved the question of whether an income tax on the

rental income of real estate is a tax on the real estate. In holding that it was not, the Court said (p. 83):

> "Such tax is not a tax against the real estate * * *"

It was also said (p. 81):

> "An income tax is an assessment upon the income of the person and not upon any particular property from which that income is derived."

Also (p. 82):

> "No case has been cited, and we are unable to find one, holding that an income tax is a tax on an interest in land; and the nature of the tax itself, which is a tax made on the net income of the individual, is such as to preclude the idea of a tax against property."

The reasoning of the Illinois court in the case last cited is clear and concise, and the Court is respectfully referred to the opinion in said case for substantiation of the position taken in this brief.

In *Park Bldg. Co. v. Yost Fur Co.*, 208 Mich. 349, after considering a contention based on the *Pollock* case that a tax on rental income was a tax on the real estate, the Court said (p. 361):

> "Whether direct or indirect, the lessor's income tax as applied to this leased property is not a tax 'levied upon said premises,' or on any of the four estates named in the lease, but is in its process of levy and assessment a direct personal tax against him, inseparable from him and his annual income, beginning and ending with him."

See to the same effect,

Catawissa R. R. Co. v. Philadelphia & Reading Ry. Co., 255 Pa. St. 269.

Still another case which contains very lucid reasoning establishing that a tax on rental income is not a tax on the real property from which such income is derived is *State v. Wisconsin Tax Commission,* 166 Wis. 287, in which it was said (p. 290):

> "Much confusion of thought arises from regarding the income tax as a tax that is levied upon or attaches to property as such, irrespective of the person sought to be taxed. It is the recipient of the income that is taxed—not his property,—and the vital question in each case is, Has the person sought to be taxed received an income during the tax year? If so, such income, unless specifically exempted, is subject to a tax though the property out of which it is paid may have been exempt from an income tax in the hands of the payor. It is the relation that exists between the person sought to be taxed and specific property claimed as income to him that determines whether there shall be a tax. If the person sought to be taxed is the recipient during the tax year of such specific property as income in its ordinary significance, then the person is taxed. But the tax is upon the right or ability to produce, create, receive, and enjoy, and not upon specific property. Hence, the amount of the tax is measured by the amount of the income irrespective of the amount of specific property or ability necessary to produce or create it. In the ordinary acceptation of the term this may be said to be a tax upon income as the statute denominates it. But the tax does not seek to reach property or an interest in property as such. It is a burden laid upon the recipient of an income."

UNION REFRIGERATOR TRANSIT CO. V. KENTUCKY, 199 U. S. 194

This case had to do with a tax on railroad cars, and it was held that the State of Kentucky could not tax such cars when the same were not within its jurisdic-

tion. One of the reasons assigned for denying the right to tax in that case is available to sustain the right to tax here. It was there said (p. 204):

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation."

It cannot be said in this case that Mrs. Pierson has not received the protection for which the New York tax is supposed to be the compensation. She has had all the protection which that State gives to its residents and should pay for it. A tax on her net income is not compensation for protection accorded to the real estate in Ohio.

It should be noted that the case under discussion especially reserved the question of the taxability of income from real property and tangible personal property having its situs without the boundaries of the taxing state, this Court saying (p. 204):

> "True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived."

OTHER CASES

In *Kirtland v. Hotchkiss,* 100 U. S. 491, the issue was very close to that in the case at bar. Connecticut had taxed one of its residents on bonds secured by

mortgages of real property in Illinois, the bonds being kept in the latter state. It was claimed that this was taxing property not within the jurisdiction of Connecticut. This Court said (p. 498):

> "The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys."

Also, at p. 499:

> "Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own" [or, may we not interpose, by the amount of the income which they receive] "(other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal government cannot rightly interfere."

In considering the *Kirtland* decision, consideration must be given to the fact that a mortgage on real property has been held to be an interest in it and taxable where the land is situated, even though the owner be a nonresident of the jurisdiction. See *Savings & Loan Society v. Multnomah County*, 169 U. S. 421.

In *Shaffer v. Carter*, 252 U. S. 37, 52, it was said:

> "* * * a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control."

This again brings out the thought that the tax is a personal tax.

Former Chief Justice White of this Court considered a net income tax as being generically an indirect tax. In *Stanton v. Baltic Mining Co.*, 240 U. S. 103, he said (p. 113):

> "In other words, we are here dealing solely with the restriction imposed by the Sixteenth Amendment on the right to resort to the source whence an income is derived in a case where there is power to tax for the purpose of taking the income tax out of the class of indirect to which it generically belongs and putting it in the class of direct to which it would not otherwise belong in order to subject it to the regulation of apportionment."

Maguire v. Trefry, 253 U. S. 12, also is in point. The tax there laid was upon the income of a Massachusetts resident from intangibles held in trust in Pennsylvania by a Pennsylvania trustee. Under the rule laid down by this Court in *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, Massachusetts had no greater power to tax these intangibles than it would have had to tax real property in Pennsylvania, as the *Pollock* case also held that a tax on the income of personal property was a tax on the property itself in the sense that it was a direct tax within the meaning of the Constitution. If relator's argument is correct, it would seem that this Court erred in deciding that Massachusetts did have power to tax the income from these intangibles.

It is recognized that in the *Safe Deposit & Trust Co.* case, as well as in the *Maguire* case, it was brought

out that there is a sufficient distinction between the equitable and legal ownerships in intangibles to permit the taxation of the former at the domicile of the owner thereof, whereas the legal ownership may not be there taxed because the property is in the hands of a trustee in another state. With this principle in mind, it does not seem that there ought to be any difficulty about the taxation at a person's domicile of his net income based in part upon income from foreign real property. The legal interests protected and taxed by Pennsylvania and Massachusetts in the *Maguire* case were different, and this was sufficient to sustain taxation by both states. By the same reasoning the tax at bar may be sustained, as the legal interests protected and taxed by Ohio and New York are entirely different.

The New York tax is no more of a tax on the Ohio real estate than is a tax on the net income of a corporation derived from exporting goods from the State a tax on the articles exported. See *Peck & Co. v. Lowe,* 247 U. S. 165.

It is fundamental that a state may not impose a tax on receipts from interstate commerce, because such a tax would tend to regulate or burden such commerce in violation of the commerce clause of the Constitution. Nevertheless, a net income tax computed by including such receipts in gross income is not offensive. *United States Glue Co. v. Oak Creek,* 247 U. S. 321. The same principle is invoked here.

In *Bates v. Boston,* 5 Cush. 93, at p. 99, Chief Justice Shaw said:

> "The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee."

So, here, the assessment on relator's net income made by the State of New York does not touch the Ohio real estate, or control or interfere with it, or hold it to any accountability. It affects only the income after it has been paid over.

The New York tax is not levied, and in the nature of things a net income tax cannot be, until the expiration of the taxable year and after the income has been reduced to the possession of the taxpayer. By that time it has lost any distinctive character that it may have had, whether as rent of real property or what not, and is incorporated into the mass of the taxpayer's estate at his domicile.

If the net income tax were aimed at income from foreign realty, a different question might be presented (*Miller v. Milwaukee*, 272 U. S. 713), but a careful study of the New York personal income tax act fails to give any indication of a purpose to reach the income of foreign real estate as a special or distinct subject of taxation.

The State of New York, by its personal income tax act imposing a tax based upon "net income", has asserted no jurisdiction of any kind over the real estate owned by the relator situated in the State of

Ohio, and has imposed no tax upon it. This being so, it has violated no right of the relator guaranteed by the Constitution of the United States, and the decision below should be reversed by this Court.

Respectfully submitted,

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